



December 4, 2018

Submitted via Email and FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460
(202) 566-1677
hq.foia@epa.gov

**Re: FOIA Request for Information Related to EPA's Risk Evaluation for
Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-d'e'f]diisoquinoline-
1,3,8,10(2H,9H)-tetrone**

Dear Freedom of Information Officer:

Earthjustice submits this request (the "Request") for records on behalf of Earthjustice, the Natural Resources Defense Council ("NRDC"), Environmental Defense Fund ("EDF"), and Safer Chemicals Healthy Families ("SCHF") (collectively, the "Requesters") in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2016), and the implementing regulations of the U.S. Environmental Protection Agency ("EPA" or the "Agency"), 40 C.F.R. Part 2. The purpose of the Request is to obtain records relating to EPA's draft *Risk Evaluation for Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-d'e'f]diisoquinoline-1,3,8,10(2H,9H)-tetrone* ("Risk Evaluation")¹ under the Toxic Substances Control Act ("TSCA"). Since the draft Risk Evaluation was published for public comment on November 15, 2018 and the comment period is currently scheduled to close on January 14, 2019, your prompt response pursuant to the requirements of FOIA is appreciated.

DEFINITIONS

The Requesters seek the unredacted records listed below. The use of the word "unredacted" means that we are seeking full disclosure of all information in the requested record. In the event that you determine that you cannot disclose all of the information contained in a particular record, please provide us with a copy of the record with redactions of only the information that you have determined to be properly withheld and explain the basis for your determination that such information must be withheld.

The use of the word "records" herein means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic, or otherwise produced, reproduced, or stored), letters, emails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, summaries of

¹ Available at https://www.epa.gov/sites/production/files/2018-11/documents/draft_pv29_risk_evaluation_public.pdf.

telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. The term “records” as used above also includes any personal email messages, telephone voice mails or text messages, and internet ‘chat’ or social media messages, to the full extent that any such messages fall within the definition of “agency records” subject to FOIA, and including any attachments. Per EPA records management policy, electronic messages such as text messages are agency records, which must be preserved and made accessible under FOIA. *See* U.S. Env’tl. Prot. Agency Info. Pol’y, Records Management Policy (2018) at 3, <https://www.epa.gov/sites/production/files/2015-03/documents/cio-2155.3.pdf>. Therefore, a production of responsive records must include records using services including, but not limited to: Google Chat, Google Hangout, Skype, IBM Sametime, Novell Groupwise Messenger, Facebook Messenger, iMessage and all other texting services, Short Message Service (SMS) and Multimedia Messaging Service on devices including but not limited to, Blackberry, Windows, Apple or Android devices; and Google Voice, Twitter Direct Message, Slack, WhatsApp, Pigeon, Yammer, Jive, and all other internal or external collaboration networks.

For this purpose of this request, the term “records” shall exclude any documents that have been posted for public review in the following dockets, and the Requesters are not asking EPA to search the following dockets in response to the Request: EPA-HQ-OPPT-2016-0725 (“Pigment Violet 29; TSCA Review and Risk Evaluation”) and EPA-HQ-OPPT-2018-0604 (“Draft Toxic Substances Control Act Risk Evaluations: Colour Index Pigment Violet 29”).

The use of the term “Pigment Violet 29” herein shall refer to the substance described in the draft Risk Evaluation as C.I. Pigment Violet 29 (Anthra[2,1,9-def:6,5,10-d'e'f]diisoquinoline-1,3,8,10(2H,9H)-tetrone).

The use of the term “EPA staff” shall refer to any person employed by or working on behalf of EPA, as a permanent employee, temporary employee, independent contractor, or volunteer.

RECORDS REQUESTED

In accordance with FOIA, please provide us with the following records. Unless otherwise stated, the time period covered by these requests is June 22, 2016 onward.

- 1) All communications between EPA staff and any employee, representative or agent of (1) Sun Chemical Corporation or (2) the Color Pigments Manufacturers Association relating to Pigment Violet 29, including but not limited to the personal communications between Dr. Robert C. Mott (Sun Chemical Corporation) and Alie Muneer (EPA) referenced in the draft Risk Evaluation. *See* Risk Evaluation at 34.
- 2) All records that were provided or generated in connection with the February 13, 2017 Outreach Meeting with Color Pigments Manufacturers Association and EPA to discuss Toxic Substances Control Act (TSCA) First Ten Chemicals, *see* <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OPPT-2016-0725-0026&contentType=pdf>, including but not limited to any presentation slides, handouts, minutes, meeting notes, and preceding or follow-up emails.

- 3) All workplace air monitoring data or other records, irrespective of date, supporting EPA's statement in the draft Risk Evaluation that "approximate maximum workplace air concentration of 0.5 mg/m³ would be expected over a 12 hour shift." *See Risk Evaluation at 22.*
- 4) All monitoring data or other records, irrespective of date, supporting EPA's statement in the draft Risk Evaluation that "of the NPDES-permitted TSS discharges for this sole domestic manufacturing facility, it is estimated that 0.6 lb/day of C.I. Pigment Violet 29 is being discharged (<0.1 percent of produced C.I. Pigment Violet 29)." *See Risk Evaluation at 21.*
- 5) The full study reports, irrespective of date, for each of the 24 individual scientific studies described in the draft Risk Evaluation, including:
 - a. 20 studies associated with robust summaries for Pigment Violet 29 submitted to the European Chemicals Agency. *See Risk Evaluation at 5* ("The EPA obtained full study reports associated with the European Chemicals Agency (ECHA) robust summaries ... The EPA has reviewed these full study reports ...") and at 39-43; and
 - b. 4 additional studies described in the Risk Evaluation at 18 ("Three human health studies and one environmental fate study received from the data owners were not explicitly summarized in the ECHA Database, or the Food Additive Petition (FAP) 8B4626.")
- 6) Records relating to EPA's obtaining of the full study reports described in Request 5.

RECORD DELIVERY

To the extent practicable, the Requesters seek electronic copies of the above documents in native file format, or, if that is not practicable, with full metadata for all fields. *See* 5 U.S.C. § 552(a)(3)(B) (agency shall provide records in any form or format if the record is readily reproducible in that form or format). If any information requested herein was, but is no longer, in EPA's possession or subject to its control, please state whether it (a) is missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) is otherwise disposed of, and in each instance, please explain the circumstances surrounding and authorization for such disposition of it, and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>. If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;

- (4) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.
- (5) If you do not use your discretion to release such complete and unredacted records: (a) examine each information request to determine if reasonably segregable non-exempt information exists that may be released after redacting information deemed to be exempt; and, (b) provide us with a copy of each record with redactions of only the information that you have determined to be properly withheld;

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552, we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As demonstrated below, all of the four factors related to the first fee waiver requirement, as specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)(i)–(iv), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

I. THIS REQUEST IS IN THE PUBLIC INTEREST

A. Factor 1: The Requested Records Concern the Operations or Activities of the Federal Government

The subject matter of the requested records concerns “identifiable operations or activities of the Federal government” 40 C.F.R. § 2.107(l)(2)(i). The records concern “identifiable operations” because they relate to EPA’s preparation of the draft Risk Evaluation under TSCA. The Department of Justice Freedom of Information Act Guide acknowledges that “in most cases records possessed by the federal agency will meet this threshold” of identifiable operations or activities of the government. *Department of Justice Guide to the Freedom of Information Act: Fees and Fee Waivers* at 27 (2014), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf>. There is no question that this is such a case.

B. Factor 2: Disclosure of the Requested Records Is Likely to Contribute to Public Understanding of Government Operations or Activities

The next factor considered by EPA is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already...in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, disclosure of the requested records is “likely to contribute” to an “increased public understanding,” 15 C.F.R. § 4.11(l)(2)(ii), of government operations or activities. The draft Risk Evaluation has been published for public comment, but the studies that EPA relied upon and critical information concerning Pigment Violet 29’s uses, exposures, and risks have not been made public. Disclosure of the requested information will enable the public to better understand and comment on EPA’s draft Risk Evaluation. Moreover, the Request specifically excludes materials that are “already in the public domain” due to their inclusion in the EPA’s public dockets.

C. Factor 3: Disclosure of the Requested Records Will Contribute to the Understanding of a Broad Audience of Persons Interested in the Draft Risk Evaluation

EPA next considers whether disclosure will contribute to “public understanding” of the subject. 40 C.F.R. § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000).

Here, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in” the evaluation and regulation of Pigment Violet 29. EPA’s Risk Evaluation will determine whether Pigment Violet 29 is subject to regulation under TSCA, and thus whether the public is adequately protected from any unreasonable risks associated with that chemical. Pigment Violet 29 is used in a range of commercial and consumer products, including but not limited to paints, coatings, and plastic and rubber products. *See* Risk Evaluation at 9; *see also* EPA, *TSCA Work Plan for Chemical Assessments: 2014 Update Table* at 2 (describing Pigment Violet 29 as “[w]idely used in consumer products.”) In the draft Risk Evaluation, EPA relied upon studies and personal communications with industry representatives that have not been made public. The public’s ability to review and comment on the draft Risk Evaluation is impaired by the lack of access to the studies and information requested herein.

The Requesters have the “ability and intention to convey this information to the public.” 40 C.F.R. § 2.107(l)(2)(iii). Earthjustice, NRDC, SCHF, and EDF are nonprofit environmental organizations with lawyers, scientists, and public policy professionals on their respective staffs. They have made the promotion of safe and healthy communities free from the health burdens of toxic chemicals a top priority, and they were all actively engaged in the 2016 amendments to TSCA. They have expertise related to both the evaluation and regulation of chemicals under TSCA, and they are well-prepared to evaluate the requested records once received.

The Requesters also have mechanisms in place to share information obtained from the requested records with the general public and other interested organizations. They have submitted

and publicized comments on the Risk Evaluation scope and problem formulation documents;² co-authored a brief in pending litigation challenging EPA's risk evaluation procedures;³ and published numerous articles, blogs, social media postings, and press releases concerning the regulation and evaluation of toxic chemicals. The Requesters are well-positioned to share the requested information with interested audiences. Earthjustice's website receives approximately 816,000 page views per month and its quarterly print magazine has a circulation of approximately 100,000. EDF's website receives approximately 711,000 page views per month and its quarterly print magazine has a circulation of approximately 307,000. NRDC's website receives approximately 1.3 million page views per month and its weekly electronic environmental newsletter is distributed by email to more than 86,700 subscribers. Finally, all of the Requesters employ or retain communications professionals that can disseminate newsworthy information obtained from this request to the media.

D. Factor 4: The Contribution to Public Understanding of Government Operations or Activities Will Be Significant

The fourth factor EPA considers is whether the records are "likely to contribute 'significantly' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (stating that the relevant test is whether public understanding will be increased after disclosure, as opposed to the public's understanding prior to the disclosure). Where information is not currently available to the general public, and where "dissemination of information...will enhance the public's understanding," the fourth factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

This request satisfies the fourth factor. One cannot retrieve the requested records in their entirety, or all the information contained therein, through EPA's website or internet searches. Thus, the public's understanding of the draft Risk Evaluation "will be significantly enhanced by the disclosure." *See* 15 C.F.R. § 4.11(l)(2)(iv).

II. REQUESTERS HAVE NO COMMERCIAL INTEREST IN DISCLOSURE OF THE REQUESTED RECORDS

Requesters are 501(c)(3) nonprofit organizations and they do not have any "commercial interest that would be furthered by the requested disclosure" of information. 40 C.F.R. § 2.107(l)(3)(i). The requested records would be used only in furtherance of their respective missions to inform and protect the public on matters of vital importance to the environment and public health.

In sum, this request meets the requirements for a fee waiver. In the event that fees are not waived, please notify us and inform us of the basis for your decision.

² *See, e.g.*, EDF, Comments on Ten Problem Formulations under the Toxic Substances Control Act (Aug. 16, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0210-0066>; SCHF et al., Comments on Risk Evaluation Problem Formulation Documents for Ten Chemical Substances under the Toxic Substances Control Act (Aug. 16, 2018), <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2016-0725-0068>.

³ *See* Brief for Petitioners, *Safer Chemicals, Healthy Families et al. v. EPA*, No. 17-72260 (9th Cir. Apr. 16, 2018).

INSTRUCTIONS FOR RECORD DELIVERY

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must...indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please also produce the records on a rolling basis; at no point should EPA’s search for, or deliberations concerning, certain records delay the production of others that EPA has already retrieved and elected to produce. Please promptly make available copies of all requested records, preferably through the FOIA Online system or via email at the contact information below:

Jonathan Kalmuss-Katz
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jkalmusskatz@earthjustice.org

If you find that this Request is unclear or if the responsive records are voluminous, please contact me at (212) 823-4989 to discuss the proper scope of this Request. Thank you for your assistance.

Sincerely,



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